REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION 143 OF 2008

STUNTWAVE LIMITED……APPLICANT

versus

KENYA REVENUE AUTHORITY…….RESPONDENT

JUDGMENT

Stuntwave Ltd. is a registered and licensed importer of sugar pursuant to the provisions of the sugar Act No. 10 of 2001. The Respondent is KENYA REVENUE AUTHORITY. The sugar quota to be imported for the year 2006 with the **COMESA FTA** was **89000** metric tones. Out of that amount, Mat International Ltd. imported 10,800 metric tones but the sugar did not enter the Kilindini Port and was re exported to Zanzibar and Madagascar, and the Sugar Board was duly informed of that re-exportation. On 6th September 2006, the Applicant informed the Respondent that due to re-exportation of the 10,800 metric tones, it had to be recouped from the 2006 Sugar Imports. The Applicant then imported 989 metric tones of sugar from Swaziland on 10th November 2006 with the **COMESA FTA** concessions and duly lodged entry numbers 498990 and 498992 with the necessary import clearance documents for processing and release of the consignment but the Respondent gave the excuse that the Applicant's consignment was awaiting the Landing Certificate from the countries of destination to which the 10,800 metric tones were exported by Mat International Ltd. The Applicant's clearing agent by letter dated 6th December 2006 sought extension of time to enter the consignment for 30 days, but the Respondent replied that it was in the process of ascertaining the re-exportation of the sugar which had been re exported under the 2006 quota and that the issue of recoupment of **COMESA** sugar quota was in court in Mombasa HCC 1064/06 – **R V KENYA REVENUE AUTHORITY ex parte SIMBA COMMODITIES LTD.** (pg 73 of annextures). The court delivered its ruling in the said case on 9th February 2007 allowing the application with costs and the Applicant informed the Respondent of the outcome of the case and sought clearance of the consignment but despite several requests, the sugar was not released. That is why the Applicant preferred this application seeking an order of mandamus to command and compel the Respondent to process, clear and release the Applicant's 989 metric tones of brown imported sugar, imported on 10th November 2006 under the **COMESA** mutual tariff concessions for the period 2006, free from any penalties or accrued customs warehouse rent accrued since 10th November 2006. It is the Applicant's contention that the Respondent has acted illegally and unlawfully, ultra vires the functions of the Respondent, abused its power, that the decision is unreasonable and irrational, made in bad faith unfair and unjust in the circumstances. The Application was supported by a statement of facts and verifying affidavit of Musumali Meralli, the Director of the Applicant. The Applicant also filed skeleton arguments on 30th May 2008.

The Respondent opposed the Notice of Motion and Pauline Jepkangor Kipkulei, a Revenue officer

with the Respondent swore an affidavit dated 18th June 2008 in which she depones that by the time the Applicant imported the sugar of 989 metric tones, on 10th November 2006, the 89000 metric tones of sugar available for the year 2006 under the **COMESA** mutual tariff concession had been exhausted. That the Applicant's Counsel was advised of that position under a facsimile dated 4th May 2007 (PCK 1). That in any event, an order of mandamus cannot issue in the circumstances when an order of certiorari has not issued to quash the decision of the Respondent dated 4th May 2007 which informed the Applicant that the quota was exhausted. Mr. Matuku Counsel for the Respondent submitted that HCC 1064/07 was different from the instant case because in that case the issue was the waiting to confirm whether sugar was re-exported to Madagascar or Zanzibar, on 10th June 2006, but that in this case, the quota is exhausted. Mr. Asige, Counsel for the Applicant replied that the letter dated 4th May 2007 was quashed on 9th February 2007 in the ruling in 1064/04. That when the Applicant did the importation, the letter dated 4th May 2007 was written 7 months after importation.

I have now considered the application the reply, rival submissions by Counsel and the case law relied upon. There is no suggestion by the Respondent that the Applicant did not comply with all the preconditions in the importation of the 989 metric tones of sugar.

As evidenced by the letter dated 28th July 2006 Mat International Ltd. informed the Respondent of the re exportation of the sugar consignment to Zanzibar (MCM 2) and Madagascar and the said re exportation was verified authorized and endorsed by the Respondent as evidenced by, (MGM 3) a shipping order. The Sugar Board also confirmed the re exportation and advised that the 10,800 metric tones could be recouped from the 2006 imports (MGN 4). The Applicants made their imports on 10th November 2006 following the shortfall experienced as a result of the re-exportation of the sugar by Mat International Ltd. The Respondent has not demonstrated how that shortfall was realised after the said re exportation to Zanzibar and Madagascar by Mat International Ltd so that the quota could be exhausted. There is no basis for the Respondent alleging that the quota had been exhausted.

Besides, the Respondent's decision that the quota was exhausted came too late in the day, ie 7 months after the Applicant had imported the sugar. At the time the Applicant lodged their papers the Respondent never intimated that the quota was exhausted. I would hold like Justice Maraga did in HMisc 1064/06 that since the Respondent had not cleared Mat International Ltd. sugar into the domestic market and having supervised the reshipping of the said sugar for re export by Mat International Ltd., the Respondent did not require anything else in order to clear the Applicants sugar. The Applicant could recoup that sugar and in any case the Applicant has brought in only 989 metric tones as opposed to Mat's 10800 tones. The excuse that the quota was exhausted is an afterthought and in my view made arbitrarily because there is no basis for it.

In their letter of 29th December 2006 to the Director of Union Clearing and Forwarding Ltd. the Respondent gave their reasons for not processing the Applicant's documents, that they were waiting to ascertain the re exportation of the sugar by Mat International Ltd. and the fact that HCC 1064/06 was pending determination. It is not in dispute that HCC 1064/06 was determined on 9th February 2007 in favour of Simba Commodities Ltd. The said suit arose from similar circumstances whereby Simba Commodities sought to export the shortfall of the sugar that had been re exported by Mat International Ltd. just like the Applicant seeks to. The court allowed the orders of certiorari, mandamus and prohibition which were sought by the Applicant. Having given two reasons for refusal or delay in processing the Applicants documents the Respondents change of mind and excuse that the quota was exhausted is in my view evidence of bad faith, arbitrariness and irrelevant considerations. The order of certiorari and prohibition having been issued in 1064/06 there would be no need to seek the same orders as they were dealing with the same decision made by the Respondent. In any event the reason given in the letter dated 4th July 2007 was made after the importation.

I would adopt the Court of Appeal's decision in CA 89/07 **STUNTWAVE LTD V KENYA REVENUE AUTHORITY & ANOTHER**, where the court said;

"……..**KENYA REVENUE AUTHORITY is a public body whose statutory duty is to clear imported goods when the importers have met all the preconditions of importation. As KENYA REVENUE AUTHORITY declined to clear the Applicant's sugar duty free the Superior Court erred in holding that no statutory duty lay with KENYA REVENUE AUTHORITY ….. to clear the sugar……"**

In the instant case the Applicant has met all the preconditions to importation of sugar. The Respondent has given conflicting reasons for refusing to process their documents and I will find that they have unfairly and without good reason failed to carry out their duties. An order of mandamus lies to compel performance of a statutory duty. It is the duty of the Respondent to clear and approve the Applicant's application which duty they have unfairly declined. I will direct that an order of mandamus do issue compelling the Respondent to process and clear the said documents and release the Applicant sugar without charging any penalties or warehouse rent from 10th November 2006 to date.

In the circumstances I direct that each party bears their own costs.

Dated and delivered this 25th day of October 2008.

R.P.V. WENDOH

JUDGE

Present:

Mr. Asige for Applicant

Ms. Ngugi for the Respondent

Daniel: Court Clerk